IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1441

STATE OF ARIZONA, Petitioner,

v.

PHELPS DODGE CORPORATION, a New York corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRUCE E. BABBITT
The Attorney General of Arizona

PETER C. GULATTO
Assistant Attorney General
200 State Capitol
Phoenix, Arizona 85007

Attorneys for Petitioner

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Attorneys for Petitioner

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

Attached as Appendix A is the opinion of the court below which is by the Court of Appeals for the Ninth Circuit.

JURISDICTION

Jurisdiction of the United States Supreme Court is invoked under 28 USC§ 1254(1) 1966, which permits the United States Supreme Court to issue a writ of certiorari to the United States Court of Appeals. The Judgment sought to be reviewed is dated February 25, 1977 (Appendix A), and pursuant to Rule 36 of the Federal Rules of Appellate Procedure was entered on that date, but as contemplated by 28 USC § 2101(195), this petition for writ of certiorari is timely because it is filed within ninety (90) days from the date of denial by the United States Court of Appeals for the Ninth Circuit of Petitioner's petition for rehearing to that court. The petition for rehearing was denied April 28, 1977.

QUESTIONS PRESENTED

1. Where lands acquired under a Taylor Grazing Act deed of reconveyance by the United States from the State of Arizona are subject to a reservation of mineral rights to the State of Arizona, is the United States' successor in interest, who claims title to the mineral rights on the theory that its grantor had no right to make a reservation of such rights, estopped from asserting the validity of a mineral reservation in his instrument of conveyance?

2. Even if the State of Arizona did not have authority on May 11, 1945, to reserve mineral rights in Taylor Grazing Act exchanges, did the subsequent action in 1948 by the Arizona Legislature ratifying and approving all land exchanges made prior to 1948 between the United States and the State of Arizona under the Taylor Grazing Act cure any defects in the exchange documents and thereby validate the reservation of mineral rights to the State of Arizona?

3. Did the determination that the mineral reservation contained in the deed of reconveyance was invalid render the entire exchange void?

THE STATUTORY PROVISIONS INVOLVED

43 USCA § 315g(c) and (d); § 28 of the New Mexico-Arizona Enabling Act found at 36 U.S. Stat. 557, 586-579 (1910); § 11-1212, Arizona Code Annotated of 1939 (Supp. 1952). These are set forth verbatim in Appendix B.

STATEMENT OF THE CASE

On May 11, 1945, under authority of the Taylor Grazing Act [48 Stat. 1269 (1934)] as amended by the Act of June 26, 1936 [49 Stat. 1976], the State of Arizona by a Deed of Reconveyance, granted certain lands to the United States "reserving to the State of Arizona all Mineral Deposits and Rights, together with the right to prospect for, mine and remove the same. . . ." in exchange for which the United States of America by Patent No. 1120281 dated November 5, 1945, granted to the State of Arizona certain lands subject to the reservation of the United States of "all minerals in the lands so granted, together with the right to prospect for, mine and remove the same, as authorized by the provisions of said Section 8, as amended as aforesaid."

Also pursuant to these same exchange provisions, on February 3, 1969, by Patent No. 02-69-0058, the United States granted the land to respondent Phelps Dodge Corporation "subject to and reserving to the State of Arizona all

minerals as appear of record in Deed dated May 11, 1945, recorded in Book 47 of Deeds, pages 211-212 of the records of Graham County, as to said . . ." lands.

The Lands involved, more particularly described (1) T5S, R25E, Sec. 36: All, G&SRB&M; (2) T5S, R25E, Sec. 32: All, G&SRB&M; and (3) T6S, R25E, Sec. 2: Lots 1, 2, S 1/2 NE 1/4 SE 1/4 G&SRB&M, were originally granted to the State of Arizona by the United States as School Trust Lands under the Arizona Enabling Act [36 Stat. 557 (1910)]. Subsequently the Congress of the United States enacted the Taylor Grazing Act primarily to carry out the following objectives:

> To stop injury to the public grazing lands by preventing overgrazing and soil deterioration; to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes.
>
> 48 Stat. 1269 (1934).

The Act itself generally provided for a leasing system of federal range lands but also included the provision whereby exchanges of land could be made in order to facilitate government management of range lands to consolidate government holdings. See P. Gates, History of Public Land Law Development at 610, et seq.

Respondent Phelps Dodge Corporation commenced this action in the United States District Court for the District of Arizona to attack the

validity of a reservation of mineral rights by the petitioner, State of Arizona, claiming fee ownership and title to the land in question under its patent from the United States and asserting the invalidity of the mineral reservation to the State of Arizona. Phelps Dodge asserted ownership of the mineral estate in the lands upon an asserted lack of authority of the State of Arizona and subsequently the United States government to reserve mineral rights and that therefore Phelps Dodge is the owner of the mineral estate in the land.

The United States District Court for Arizona, Hon. Walter E. Craig presiding, ruled that the reservation of minerals by Arizona in the Taylor exchange was invalid unless there could be a showing that there were minerals in place in iconomically feasible quantities at the time of the exchange. The District Court rejected Arizona's arguments regarding estoppel, ratification, and violation of the Arizona Enabling Act requirements. On March 11, 1975, the District Court's judgment in favor of Phelps Dodge was filed, declaring title to the lands in question vested in Phelps Dodge, free and clear from any claim or claims of Arizona, barring and estopping Arizona from claiming any right, title, claim, lien or interest, including mineral rights, in or to said lands. Arizona appealed to the United States Court of Appeals for the Ninth Circuit, which by the opinion attached as Appendix A, affirmed the District Court's decision.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Under 28 USC § 1441(b), any civil action filed in a state court which is founded on a claim or right arising under the Constitution, treaties, or laws of the United States, may be removed to the United States District Court. The action was filed initially in the Arizona Superior Court. Under authority of 28 USC § 1441(b), the case was removed to the United States District Court for Arizona because the action required interpretation of the Taylor Grazing Act (48 Stat. 1264) as amended by Act of June 26, 1936 (49 Stat. 1976); 43 USC § 315g(c) and (d), and of United States patents issued thereunder, and also required a determination of whether § 28 of the New Mexico-Arizona Enabling Act (36 Stat. 557, 568-579 (1910)) authorized Arizona to reserve mineral rights in school trust property exchanged under authority of the Taylor Grazing Act.

This action was also removed from the Arizona Superior Court to the United States District Court for Arizona on the basis that 28 USC § 1442 authorizes such removal when the case involves a property holder whose title is derived from an officer of the United States and where the prosecution of such action will affect the validity of any law of the United States. The case affects the validity of the Taylor Grazing Act.

REASONS FOR GRANTING THE WRIT

1. The decision below in determining that the reservation of the mineral estate by and to the State of Arizona in the Deed of Reconveyance dated May 11, 1945, and the reservation of the mineral estate to the State of Arizona in the patent issued to petitioner on February 3, 1969, were invalid conflicts with Wier v. Texas Co., 180 F.2d 465 (5th Cir. 1950), and United States v. Price, 111 F.2d 206 (10th Cir. 1940).

2. The decision below fails to recognize that when a surface owner claims title to mineral rights on the theory that his grantor had no right to make a reservation of such rights, the surface owner is estopped from asserting that the mineral rights passed to him under his instrument of conveyance.

3. The decision below fails to recognize that all exchanges made prior to 1948 between the United States and the State of Arizona under the Taylor Grazing Act were ratified and approved by the Arizona Legislature by § 11-1212, ACA 1939 (Supp. 1952).

4. The decision below fails to recognize that if the mineral reservation was invalid, the entire exchange between the United States and the State of Arizona in void.

ARGUMENT OF REASON NO. 1 FOR GRANTING THE WRIT

The opinion below voided a specific mineral reservation in the deed of reconveyance of lands from the State of Arizona to the United States which reserved the mineral estate to the State of Arizona and also rendered void a specific provision contained in the patent under which respondent claims title. The opinion is laconically based on a totally unfounded conclusion that the deed of reconveyance and the patent are irregular on their face. An examination of the deed and the patent shows no irregularity (Appendix C contains copies of the deed of reconveyance and of patent No. 02-69-0058). The only way the deed may be deemed irregular is to look behind the deed to the circumstances under which it was issued. Based on this observation the decision below is in direct opposition to the decision in Wier v. Texas, 180 F.2d 465 (5th Cir. 1950). In the Wier case, the plaintiff sought to invalidate a mineral reservation in his chain of title which showed that a third party owned the minerals, alleging that the reservation was void as an illegal reservation pursuant to applicable state law and that an agreement in the chain of title involving the reservation was void for want of consideration. The Fifth Circuit in upholding the validity of the reservation of mineral rights stated:

> . . . [t]he Deeds comprising plaintiff's chain of title show clearly on their face that plaintiffs did not acquire or purchase any interest in the mineral rights of these lands. . . . Moreover, the receiver of the Kentucky bank having

> accepted and signed the deed with the mineral reservation in favor of the Texas Company, is estopped not only from disputing the deed itself, but every fact which the deed recites. [Citations omitted]. . . . And plaintiffs, being privies to this deed, are also estopped to deny the verity of its recitals as to the reservation. . . .
>
> 180 F.2d at 468.

Another case strikingly similar to the Wier case, supra, and also contrary to and irreconcilable with the decision and opinion below is United States v. Price, 111 F.2d 206 (1940), where the United States filed an action to establish its rights to a mineral estate under a grant pursuant to the Act of December 29, 1969, 43 USC § 291, et seq., commonly known as the Stock-Raising Homestead Act.

Section 9 of the Stock-Raising Homestead Act, 43 USC § 299, specified that:

> All entries made and patents issued under the provisions of §§ 291-301 of this title shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral

> land laws in force at the time of such disposal. . . .
>
> (Emphasis added).

The patent in question, although issued pursuant to the Stock-Raising Homestead Act, did not contain the required reservation. The Tenth Circuit held that the issuance of the patent was conclusive and stated:

> . . . The patent, regular on its face and issued in a case in which the land department has jurisdiction, constitutes an implied finding of every fact which is made a prerequisite to its issue; and upon collateral attack, a court cannot go behind it to look to the antecedent proceedings on which it is founded.
>
> U.S. v. Price
> 111 F.2d at 208.

In the case before this Court whether the State of Arizona had authority to grant and the Secretary of Interior had authority to accept a deed of reconveyance with the reservation of mineral rights, and whether the Secretary of Interior had authority to issue a patent with the reservation of mineral rights to the state, are inconsequential if the principle of law of the Price case were applied. The deed and the patent should have constituted an implied finding of every fact which is a prerequisite to the issuance, including the implied finding that

the land was mineral in character. The opinion below, taking a position totally irreconcilable with the Price case, supra, concluded that the deed was irregular on its face because upon an antecedent review it was determined the conditions which were a prerequisite to its issuance did not properly exist.

Permitting the opinion below to stand without review by this Court, especially in light of the contrary decisions in the Wier and Price cases can only lead to uncertainty of land titles derived through federal patents.

ARGUMENT OF REASON NO. 2 FOR GRANTING THE WRIT AND QUESTION PRESENTED NO. 1

It has been stated by the United States Supreme Court that a party cannot be permitted to claim both under and against the same deed, to insist on its efficacy to confer a benefit and repudiate a burden with which it h as been qualified, or to affirm a part and reject a part. Gibson v. Lyon, 115 U.S. 439, 6 S.Ct. 139, 29 L.Ed. 440 (1885).

The Ninth Circuit Court of Appeals has specifically applied this principle, referred to as equitable estoppel, to reservations of mineral rights in Russell v. Texas Co., 238 F.2d 636 (1956), cert. den. 354 U.S. 938, 77 S.Ct. 1400, 1 L.Ed.2d 1537 (1957).

The Russell case has been cited with approval

and followed by the Supreme Court of Arizona in Allison v. State of Arizona, 101 Ariz. 418, 420 P.2d 289 (1966). See also Mortenson v. Northern Pacific Ry. Co., 295 F.Supp. 158 (1969), aff'd 434 F.2d 1314 (9th Cir. 1970).

In the instant case, respondent Phelps Dodge claims no source of title to said mineral rights independent of the grant from the United States; its sole claim stems from the contention that by reason of the laws governing state land grants, Arizona did not retain title to the minerals, and that by virtue of the same laws Phelps Dodge, who has no conveyance of minerals from either the United States or Arizona, received the mineral rights.

Arizona submits the foregoing cited cases are exactly in point to the instant case. Both Russell and Mortenson dealt with the validity of reservations of minerals by railroads and the land grant laws relating thereto, while this controversy involves the validity of reservations of mineral rights under laws relating to State School Trust Lands. The principle of estoppel is an independent body of law applicable to both the land grants. Regardless of the type of land grant, the estoppel principle is the same.

The opinion below attempts to distinguish the estoppel question by citing Burke v. Southern Pacific R.R. Co., 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1529 (1914), as an exception to the estoppel principle, also relying on Campbell v. Flying V Cattle Co., 25 Ariz. 577, 220 P. 417 (1923). The opinion misconstrues and misapplies both cases. The Burke case does not support the

application of an exception to the rule of estoppel as indicated by the Court on page 4 of its opinion. Quite the contrary, examination of the case shows it defeats the opinion below. Burke involved a situation where land was subject to existing mineral claims. The litigation to clear title of a mineral reservation involved a situation by third parties whose claims were initiated after the issuance of the patent. The Court held that the patent issued by the Land Department was a conclusive declaration that the land was agricultural and all of the requirements preliminary to the issuance of the patent were met. The Court further recognized that any persons not in privity with the government in any respect when the patent was issued cannot attack the patent on the grounds of fraud, error or irregularity in issuance of the patent. This would constitute a collateral attack on a patent. It is incomprehensible that Burke was used as the basis for justification to establish an exception to the Estoppel Doctrine in the opinion below. The Burke case did not determine that the mineral reservations made prior to the issuance of the patents were invalid, the Court rather held that mineral claims arising after the issuance of the patent were invalid by applying the doctrine that the patent conclusively established that the land was agricultural. Therefore, applying the specific language, spirit and intent of the Burke case to the fact situation now before the Court, we find that a party, namely Phelps Dodge, who was not in privity with the government at the time the Taylor exchange was consummated, is attacking the validity of the patent. Further, the party which is in privity to the government, namely the petitioner, is not seeking to deny the mineral exception. The Court's reliance on the

Burke case is clearly in error. The real application of the Burke case to the present case requires arriving at the conclusion that issuing the patent and reserving the mineral rights to the State on the exchange conclusively determined that the land was mineral in character and there had been compliance with all of the requirements preliminary to the issuance of the patent. An attack by a third party, namely, respondent Phelps Dodge, who was not in privity to the United States, is a collateral attack on the patent and not condoned by the Burke case. The Court's reliance on the Burke case is erroneous and misplaced.

The other case on which the opinion below relies for its conclusion that there is an exception to the Estoppel Doctrine as it applies to the facts in the present case is Campbell v. Flying V Cattle Co., supra, which was decided in 1923 and involved the authority of the State Land Commissioner to insert reservations in a patent which were not specifically authorized by statute. Insofar as the inclusion and insertion of the reservation in respondent's patent and the acknowledgement of the reservation by the United States in executing the exchange patents, federal law and not state law applies to the federal reservation and the determination on the validity of the reservation in respondent's patent. Under the Russell, Gibson, Burke and Wier cases, supra, the law clearly dictates that the reservation of the minerals for the State of Arizona in the issuance of the patent is conclusive of the determination that the lands were mineral in character and that reservation of the minerals in the patent is not subject to collateral attack. The exchange was made under

the Taylor Grazing Act, not under any laws of the State of Arizona. The Campbell case did not apply to deeds and exchanges made under the Taylor Grazing Act. In any event, the law in Arizona was no longer that which was observed in the Campbell case at the time the respondent obtained their patent. See Allison v. State of Arizona, 101 Ariz. 418, 420 P.2d 289 (1966). The respondent did not obtain its patent until 1969. At the time the patent had issued, the law in Arizona relating to patents issued from the United States of America was that as set forth in Allison v. State, supra.

The opinion below which failed to apply the doctrine of estoppel to the mineral reservations in question is an incorrect declaration of law and casts clouds on the validity of any federal patent for which the prerequisites of issuance may be suspect.

ARGUMENT IN SUPPORT OF REASON NO. 3 AND QUESTION No. 2

The opinion below rests upon the theory that Arizona in 1945 was without authority to make mineral reservations in state lands sold or exchanged. Prior to 1948 no exchanges were authorized. The exchanges in controversy arose under the Taylor Grazing Act and occurred in 1945. Subsequently, to facilitate and to show legislative support for these exchanges, the Legislature of the State of Arizona enacted a bill in 1948 declaring the acceptance of the Taylor Grazing Act and further provided, in its relevant

part, as follows:

> All exchanges for federal land heretofore made by the commissioner and selection board, under the provisions of the Taylor Grazing Act, as amended, section 28 of the Enabling Act, as amended, or any other Act of Congress applicable thereto, are hereby confirmed and ratified.
>
> § 11-1212, Arizona Code Annotated 1939 (Supp. 1952).

The above-quoted portion of the statute is of curative nature to ensure the validity of exchanges prior to the passage of the Act. Assuming, arguendo, that the exchanges were of questionable validity, this corrective legislation ensured its validity. "'Curative statutes' are a form of retrospective legislation which reach back on past events to correct errors or irregularities and to render valid and effective attempted acts which would be otherwise ineffective for the purpose the parties intended. . . ." Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800, 816 (1952).

A legislature may validate an action by a subsequent curative act if the legislature could have originally authorized the action. Town of Canton v. Bruno, 282 N.E.2d 87, 93 (Mass. 1972); Asch v. Housing and Redevelopment Authority of City of St. Paul, 97 N.W.2d 656, 662 (Minn. 1959); People v. Holonstrom, 134 N.E. 2d 246, 247 (Ill. 1956).

Subsequent to the curative legislation, in Patent No. 02-69-1158, dated February 3, 1969 (Recorded in Docket 138, pp. 244-245, Records of Graham County, Arizona), the United States conveyed the lands to Phelps Dodge, with an added reservation for certain rights of way. The patent from the United States conveying these lands to respondent Phelps Dodge emphatically states that such transfer is "SUBJECT TO and reserving to the State of Arizona all minerals. . . ."

Respondent Phelps Dodge and the opinion below maintain that part of the original transaction between the State of Arizona and the United States is void, and that the claim of Arizona in and to the minerals, in, upon and under said land is without any rights whatsoever.

In view of the legislative provisions contained in the Taylor Grazing Act of 1934, as amended, the above-quoted State statute, which ratifies the exchanges, and the admissions and documents on exhibit, the opinion below is untenable.

Under the specific provisions of § 28 of the New Mexico-Arizona Enabling Act, any disposal of lands from the trust not made in substantial conformity with the provisions thereof is void. There was no "sale" of land for value but an acre for acre exchange under the Taylor Grazing Act. The opinion below which concludes that the Enabling Act requires legislative approval for an exchange under the Taylor Grazing Act and yet proceeds to void only a portion of the instrument

of conveyance of the exchange is totally untenable. The entire exchange must either stand or fall. By ratification of the exchange in 1948 the Legislature approved all of the provisions of the exchange, including the mineral reservation.

There was no legislative authority for the exchange prior to 1948. The exchange did not meet the requirements for sale of trust lands under the Enabling Act, as there was no appraisal of the land and no measures designed to protect the integrity of the trust as required by Lassen v. Arizona, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed. 2d 515 (1967), in the event of a direct sale without auction to an authority possessing the power of eminent domain. Clearly the sale cannot stand in part and fail in part.

ARGUMENT FOR REASON No. 4 AND QUESTION No. 3

The opinion below determined that even though the mineral reservation is invalid, the balance of the exchange stands; the patent is valid and does not fail for lack of consideration and is not a result of the Secretary of the Interior's exceeding his authority in accepting the land from Arizona. If consideration is not a valid aspect of the exchange, as the opinion below seems to say, the court is effectively saying that the exchange statutes do not constitute an arm's length transaction. This argument is inconsistent with Section 28 of the Arizona Enabling Act which requires that lands can only be taken out of the trust in the event that the trust is compensated for its true appraised value. This restriction

applies to exchanges, sales, and any other conveyance of land out of the trust. The court's observation that consideration is inconsequential is totally invalid. Even the Taylor Grazing Act contemplates that land of equal acreage be exchanged and that mineral rights either be reserved by both parties to the exchange or that they be transferred by both parties to the exchange. The determination that the Secretary's acceptance of the invalid mineral reservations did not nullify the entire transfer, places misconstrued reliance on the Burke case, as distinguished above and validates a transfer that must fail for lack of consideration. The decision in this case reaches a result which can only lead to the uncertainty of land titles. Recognizing that the land titles are crucial in a free society, the Supreme Court of the United States as far back as 1832 ruled that so long as the United States had jurisdiction to issue a patent to lands, any defects in the preliminary steps by which the grant was acquired would be cured by the grant. Bourdman v. Reed and Ford's Lessees, 31 U.S. 328, 6 Pet. 328, 8 L. Ed. 415 (1832).

This principle has become one of the basic tenants of American real property law and is supported by court decisions. See, for example, Burke v. Southern Pacific R. R. Co., supra; St. Louis Smelting & Refining Co. v. Kemp, 104 U.S. 636, 26 L. Ed. 875 (1881); United States v. Price, supra.

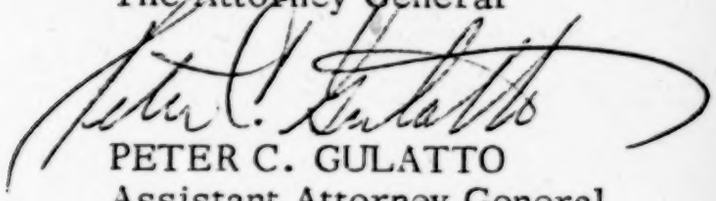
If the decision below is left standing without review, the certainty of land titles obtained through federal patents will be subject to challenge any time that it can be demonstrated that prerequisites to the issuance of a patent have not been met. This would be an intolerable result. The certainty of patents must be recognized.

CONCLUSION

For all of the reasons set forth above, petitioner requests the Supreme Court of the United States of America, by a writ of certiorari, to review the judgment and opinion of the Court of Appeals for the Ninth Circuit, attached hereto as Appendix A.

Respectfully submitted,

BRUCE E. BABBITT
The Attorney General



PETER C. GULATTO
Assistant Attorney General

CERTIFICATION

Peter C. Gulatto, being duly admitted to practice before the Supreme Court of the United States of America, herewith certifies that three copies of the petition have been delivered to the attorney for respondent by depositing the same in the office of Evans, Kitchel & Jenckes, P.C., who appeared below in the District Court and the United States Court of Appeals for the Ninth Circuit, to-wit: Newman R. Porter and Fred E. Ferguson, Jr., 363 North First Avenue, Phoenix, Arizona 85003.

Additionally, as a courtesy, I herewith certify that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States mail, first-class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C. 20530.

PETER C. GULATTO

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APPENDIX A

PHELPS DODGE CORPORATION, a New York Corp.,

Appellee,

v.

STATE OF ARIZONA, STATE LAND DEPARTMENT, and Andrew L. Bettwy, State Land Commissioner,

Appellants.

No. 75-2354

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Feb. 25, 1977

OPINION

Before BARNES and WRIGHT, Circuit Judges, and ORRICK, District Judge.*

BARNES, Senior Circuit Judge:

* The Honorable William H. Orrick, Jr., United States District Judge, Northern California, sitting by designation.

This appeal concerns the validity of a reservation of mineral rights by appellant, the State of Arizona ("Arizona"), in certain lands ("Land")[1] within its boundaries. Said Land was initially granted to appellant by the United States as school trust lands under the Arizona Enabling Act, Section 24 of the Act of Congress of June 20, 1910 (36 Stat. 557).[2]

On June 28, 1934, the United States Congress passed the Taylor Grazing Act ("Grazing Act"), 43 U.S.C. § 315 et seq., which authorized, among other things, the exchange of federal land for real property owned by states or private

1. Specifically, the lands are described as follows:

   1. Township 5 South, Range 25 East, Section 36: All
   2. Township 5 South, Range 26 East, Section 32: All
   3. Township 6 South, Range 25 East, Section 2: Lots 1 and 2, S12 NE/4; SE/4.

2. See generally, Dunipace, Arizona's Enabling Act and the transfer of State Lands for Public Purposes, 8 Ariz.L.Rev. 133 (1966)

individuals.[3] In 1936, Congress amended Section 28 of the Arizona Enabling Act to permit Arizona to dispose of school trust lands by exchange under such regulations as the Arizona legislature might prescribe. (49 Stat. 1477). In 1945, prior to the enactment of such regulations, Arizona, pursuant to an "equal acre" exchange under the Grazing Act, reconveyed the Land to the United States reserving to itself "all Mineral Deposits and Rights." Arizona received in return certain federal land subject to a mineral reservation in favor of the United States. In 1948, the Arizona legislature enacted the implementing legislation permitting exchanges under the Grazing Act and ratifying all prior exchanges. Section 11-1212 Arizona Code Annotated of 1939 (Supp. 1952) ("§ 11-1212").

In 1969, plaintiff-appellee Phelps Dodge Corporation ("Phelps Dodge") acquired title to the Land from the United States pursuant to a Grazing Act exchange, 43 U.S.C. § 315g(d). The government patent stated that the grant of the Land was subject to Arizona's reservation of mineral rights. In 1971, Phelps Dodge brought an action in Arizona Superior Court to quiet title to the Land, and for an injunction to restrain the appellant from issuing prospecting permits and/or mineral leases thereon. Arizona petitioned to remove the suit, and it was removed, to the United States District Court for the District of Arizona, as the matter in controversy was deemed to arise in part upon a construction of a federal statute. 28 U.S.C. §§ 1331(a) and 1441(b).

3. Such exchange of land could be made on either an equal acreage or an equal value basis. 43 U.S.C. § 315g(c).

The District Court found that:[4] (1) Phelps Dodge was not estopped to challenge the validity of the mineral reservation by Arizona; (2) the 1945 deed of reconveyance from Arizona to the United States was irregular "on its face" and therefore the "antecedent proceedings on which it is founded may be examined"; (3) in an equal acreage exchange under the Grazing Act, 43 U.S.C. § 315g(c), "the State is not authorized or permitted to reserve minerals in the offered lands when the lands are non-mineral in character"; (4) the reservation of mineral rights in the Land by Arizona was void as the Land was non-mineral in character and consequently the deed conveyed those rights to the United States; (5) the United States patent issued to Phelps Dodge operated to convey the mineral rights and hence the plaintiff was entitled to have its title in the Land quieted.

Arizona appeals and raises the following three issues. First, it argues that Phelps Dodge is estopped from asserting the invalidity of the mineral reservation in the deed when Phelps Dodge claims its title to the Land through that very same deed. Second, Arizona asserts that all land exchanges under the Grazing Act prior to 1948 were approved by the Arizona Legislature by § 11-1212, and hence the mineral reservation was not void under Arizona law. Third, it is argued that if the mineral reservation was void under the Grazing Act or under Arizona law then the whole exchange

4. The opinion by Judge Craig is reported in Phelps Dodge v. State of Arizona, et al., 390 F. Supp. 150 (D. Ariz. 1975).

was void and the Land must therefore belong to Arizona in fee.

1. Estoppel by Deed.

The rule of estoppel by deed is explained by the United States Supreme Court in Gibson v. Lyon, 115 U.S. 439, 447-448, 6 S.Ct. 129, 133, 29 L.Ed. 440 (1885) wherein it is said that: "[a claimant] certainly cannot be permitted to claim both under and against the same deed; to insist upon its efficacy to confer a benefit and repudiate a burden with which it has qualified it; to affirm a part and reject a part." See generally, 31 C.J.S. Estoppel, § 15, pp. 302-305. This court has applied that rule to a situation involving a reservation of mineral rights. Russell v. Texas Company, 238 F.2d 636, 640 (9th Cir.) cert. denied, 354 U.S. 938, 77 S.Ct. 1400, 1 L.Ed.2d 1537 (1957)--("Where, however, the surface owner claims title to the mineral rights, which his grantor expressly reserved to himself, on the theory that his grantor had no right to make such a reservation, the owner of the surface is estopped from asserting that the mineral rights thereby passed to him in the instrument of conveyance [citations omitted].") The Arizona Supreme Court has applied the rule, citing with approval both Gibson and Russell, in Allison v. State, 101 Ariz. 418, 420 P.2d 289, 292 (1966), where it stated: "Plaintiffs cannot claim under patents from the United States of America without confirming them, nor can they adopt portions which operate in their favor and at the same time repudiate those which are counter or adverse to their interest [citations omitted]. So it has been held under the principle of estoppel by deed, that a grantee, or those claiming under him, cannot deny the binding

authority of a reservation or exception in his deed."

However, an exception to the rule was noted by the United States Supreme Court in cases involving the transfer of land by government officials who act in excess of their statutory authority. In Burke v. Southern Pacific R.R. Co., 234 U.S. 669, 34 S. Ct. 907, 58 L.Ed. 1527 (1914), an adverse claimant sued the railroad company which had received the land in controversy pursuant to a patent from the United States government. That patent contained a clause to the effect that if any of the lands should be found to be mineral, the same would be excluded from the transfer. The railroad contended said clause was contrary to the enabling statute and hence void. The Court held that the rule of estoppel by deed did not apply because the United States Land Department officers who inserted that clause were acting in excess of their authorization and the patentee had no voice in establishing the terms of the patent. The Burke exception was followed by the Arizona Supreme Court in Campbell v. Flying V Cattle Co., 25 Ariz. 577, 220 P. 417 (1923). In Campbell the state of Arizona sold certain lands to the cattle company subject to a reservation of mineral rights. However, Arizona law at that time did not permit the state to make a mineral reservation in lands sold. The Arizona Supreme Court allowed the cattle company to raise the issue of the invalidity of the mineral reservation and refused to find any estoppel by deed stating:

> "Appellants contend further that appellee knew, when its application was filed and its bid accepted, that the certificate of purchase to be issued to it would contain the reservation to which it is now objecting and that in

consequence of this fact it is now estopped from denying the validity of such reservation. It may be true that appellee had such knowledge, though it is wholly immaterial whether it did or not, since the law did not authorize the inclusion of such a position in the certificate; but, even though it did knew such to be the practice, it would necessarily be assuned that appellee knew the law also, that it acted upon the theory that the law would be followed, and therefore that a certificate of purchase containing what section 62 required, and nothing more, would be tendered. Such is the effect of the case of Burke v. S.P.R.R. Co., supra, 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527 in which the Supreme Court of the United States held void a mineral exception in a patent issued to a railroad company, notwithstanding it was expressly agreed by the patentee that such a provision should be effective as one of the terms of the patent." 25 Ariz. at 587-88, 220 P. at 420.

The Arizona Supreme Court followed the Campbell case in State v. Drew, 83 Ariz. 91, 316 P.2d 1108, 1109 (1957), and indirectly referred to the holdings of those cases in Allison, supra, 101 Ariz. at 425, 420 P.2d at 296.[5]

5. While appellant cites to Allison as reversing the earlier Campbell and Drew decisions, such interpretation definitely misreads that case. In Allison, which involved rights of way for highways and not mineral reservations, the Arizona Supreme Court recognized "a line of cases which hold that a reservation inserted in a patent by an administrative officer without statutory authority is void." However, the Court held that

[1] Here, Arizona, while raising estoppel by deed, fails to adequately distinguish the present situation from the Burke-Campbell exception to that rule.

Akin to the estoppel by deed issue, appellant raises the old rule of public land law that a patent regular on its face and issued by the land department within its authorized jurisdiction is conclusive and is only subject to collateral attack on grounds that the patent is completely void. St. Louis Smelting and Refining Co. v. Kemp, 104 U.S. 636, 640-47, 26 L.Ed. 875 (1882); United States v. Price, 111 F.2d 206, 208 (10th Cir. 1940). The district court held, and we agree, that the deed of reconveyance between Arizona and the United States was irregular on its face as it contained a mineral reservation in land that was not mineral in character and also that the reservation was made at a time when any such reservation was per se beyond the powers of the officers of the state of Arizona (see infra). Thus, an examination of the antecedent proceedings was warranted and permissible.

II. Validity of Arizona's Mineral Reservation.

A. Statutory Scheme.

By the terms of the 1936 amendment to Section 28 of the Arizona Enabling Act, school trust lands held by Arizona (including the Land herein) could be

the patents in Allison did not fall within the rule established in that earlier line of cases, as the officer there was clearly authorized to reserve rights of way for highways in the land.

exchanged pursuant to the regulations enacted by the Arizona legislature, provided that the exchanges were made "only as authorized by Acts of Congress and regulations thereunder." Thus, the validity of Arizona's mineral reservation in the Land must be scrutinized under both federal and State laws.

B. Federal Law.

The Taylor Grazing Act, under which the exchanges of the Land were made, provides in part:

> "When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States; and in making exchanges of equal acreage the Secretary of the Interior is authorized to accept title to offered lands which are mineral in character, with a mineral reservation to the State." 43 U.S.C. § 315g(c).

The district court held that Arizona was not permitted in an equal acre exchange under the Grazing Act to reserve minerals in land which were non-mineral in character at the time of the exchange. 390 F.Supp. at 153. No cases are cited for that proposition and indeed the question appears to be one of first impression for the courts. After extensive review, we note that the legislative history of the Grazing Act does not contain any specific reference to this issue.

It is noted, however, that the Grazing Act does distinguish between mineral reservations in

equal value exchanges and reservations in equal acre exchanges. For the latter, 43 U.S.C. § 315g(c), quoted in relevant part above, contains a specific reference to lands "which are mineral in character." Conversely, 43 U.S.C. § 315g(d) states in relevant part that "either party to an exchange based upon equal value under this section may make reservations of minerals. . . ." While the language of subsection (c) is not phrased in terms of requiring that the lands be mineral for a valid reservation in equal acre exchanges, a comparison of the language used in subsections (c) and (d) does support such an interpretation. Under subsection (c) (equal acre exchanges), the statutory authorization for the acceptance by the Secretary of the Interior of offered lands with a mineral reservation to the state is specifically provided only for lands which are mineral in character. No such qualification is provided for equal value exchanges of land under subsection (d).

C. State Law.

Under Arizona law at the time of the exchange between Arizona and the United States, the State of Arizona could not reserve any mineral rights in the lands sold by it. Opinions, Arizona Attorney General, No. 58-14 (1958). If the land was mineral in character it could only be leased; if it was non-mineral it could be sold but without reservation in the conveyance. Campbell, supra, 25 Ariz. 577, 220 P. at 419; Drew, supra, 83 Ariz.91, 316 P.2d at 1109. While Arizona case and statutory law did not mention exchanges of land, no evidence has been offered that exchanges would not have been included in that rule.

Appellant argues that, despite any prior invalidity of the mineral reservation, in 1948 the Arizona legislature in its implementing legislation for the Grazing Act confirmed and ratified all previous Grazing Act exchanges inclusive of their mineral reservations. Section 11-1212 provided in part: "All exchanges for federal land heretofore made by the commissioner and selection board, under the provisions of the Taylor grazing act, as amended, section 28 of the enabling act, as amended, or any other act of Congress applicable thereto, are hereby confirmed and ratified." However, the statutory language does not indicate that the ratification was meant to extend further than the exchanges themselves to include possible concomitant, but unlawful reservations. While no direct evidence of the legislative intent for § 11-1212 could be found, it is noted that § 11-1212 also contained the provision that: "Such exchanges shall be made in the same manner and under the same rules and regulations as required in the selection of lands under the provisions of the enabling act, as amended." By requiring the exchanges to be made in the "same manner and under the same rules and regulations" as provided in the enabling act, the legislature indirectly reconfirmed the existing law under that act which included the holding of the Campbell case. It is highly doubtful that the intent of the Arizona legislature extended to include the ratifying of unlawful reservations in the exchanges.[6] This interpretation is strengthened

6. It is also noted here that, because the mineral reservation was void when made, the mineral rights would have already passed to the United States in the exchange. See in this regard, Opinions, Attorney General, No. 58-14 (1938). Consequently, even if the subsequent ratification of Grazing Act exchanges did include mineral reservations contained therein, such action would have come too late.

by the fact that it was not until 1954 that the Arizona legislature provided any authority for the State Land Commisioner to make mineral reservations in lands conveyed, Arizona Revised Statutes, § 37-231, and it was not until 1968 that the legislature authorized the Commissioner to reserve minerals in Grazing Act exchanges, Arizona Revised Statutes § 37-722.

D. Invalidity.

[2] At trial, it was proven that the Land was not "mineral in character" at the time of the exchange between Arizona and the United States under the test announced by the United States Supreme Court in Diamond Coal and Coke Co. v. United States, 233 U.S. 236, 240, 34 S.Ct. 507, 58 L.Ed. 936 (1914). Hence, Arizona's reservation of mineral rights was not consistent with the provisions of the Grazing Act. Likewise, the reservation was contrary to Arizona state law at the time it was made. The subsequent confirmation of prior Grazing Act exchanges by the Arizona legislature failed to specifically ratify it. Consequently, the mineral reservation was invalid under both federal and state law.

III. Effect of the Invalidity.

[3] Appellant argues that if the mineral reservation is invalid, then the entire exchange is void for two reasons: (1) the exchange fails for lack of consideration, and/or (2) the Secretary of the Interior exceeded his authority in accepting the Land. Appellant's contention of a lack of consideration misconstrues the nature of the transaction. The exchange of federal land for state land under the Grazing Act is not based upon contract law but rather upon the specific provisions of the statute

authorizing the exchange. Under the statute there are two ways in which the exchange can occur, on either an equal acre or an equal value basis. That an exchange under the former method could occur with a reservation in favor of only one of the parties is clearly envisioned by the Grazing Act. In such case, the presence or lack of consideration is not a relevant aspect as the terms of the exchange are dictated by the statute and are not subject to negotiation between the parties. Even if one were to accept the notion that the consideration theory is applicable to the exchange, Arizona's reservation of mineral rights in land which was not mineral in character at the time of the exchange would be worthless. As noted above, the reservation was void under Arizona law.

[4] As for the contention that the Secretary of the Interior's acceptance of an invalid mineral reservation nullified the entire transfer, the United States Supreme Court has rejected that argument, in Burke, supra, 234 U.S. at 698-710, 34 S.Ct. 907, and held instead that an invalid mineral reservation can be determined to be void while, at the same time, upholding the validity of the patent itself. Accord, Drew, supra, 83 Ariz. 91, 316 P.2d at 1109.

Conclusion.

Arizona's mineral reservation in the Land was contrary to both state and federal law at the time it was made. Phelps Dodge is not prevented from challenging the validity of the reservation under either estoppel by deed or the rule as to the inherent conclusiveness of issued patents. The decision of the district court below is affirmed.

§ 315g. Acceptance of donations of land; exchange of lands; notice of contemplated exchange; reservation of minerals, easements or rights of use; fee for exchange

* * *

(c) Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is hereby,directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State. The Secretary of the Interior shall accept on behalf of the United States title to any State-owned lands within or without the boundaries of a grazing district, and in exchange therefor issue patent to surveyed grazing district land not otherwise reserved or appropriated or unappropriated and unreserved surveyed public land; and in making such exchange the Secretary is authorized to patent to such State, land either of equal value or of equal acreage: Provided, That no State shall select public lands in a grazing district in furtherance of any exchange unless the lands offered by the State in such exchange lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes as set forth in this chapter.

When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a

reservation of all minerals to the United States; and in making exchanges of equal acreage the Secretary of the Interior is authorized to accept title to offered lands which are mineral in character. with a mineral reservation to the State.

For the purpose of effecting exchanges based on lands of equal acreage the identification and area of unsurveyed school sections may be determined by protraction or otherwise. The selection by the State of lands in lieu of any such protracted school sections shall be a waiver of all of its right to this chapter.

(d) Before any such exchange under this section shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once a week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this chapter shall, upon acceptance of title, become public lands, and if located within the exterior boundaries of a grazing district they shall become a part of the district within the boundaries of which they are located: Provided, That either party to an exchange based upon equal value under this section may make reservations of minerals, easements, or rights of use. Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. Where mineral reservations are made by the grantor in lands

conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. No fee shall be charged for any exchange of land made under this chapter except one-half of the cost of publishing notice of a proposed exchange as herein provided. June 28, 1934, c.865, § 8, 48 Stat. 1272; June 26, 1936, c.842, Title I, § 3, 49 Stat. 1976; June 19, 1948, c.548, § 1, 62 Stat. 533.

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly

at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocabor substances on, in, or under lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be produced therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12 1/2 per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby

such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee. As amended June 5, 1936, c.517, 49 Stat. 1477; June 2, 1951, c.120, 65 Stat. 51.

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid. As amended June 5, 1936, c.517, 49 Stat. 1477.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: Provided, that said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act. As amended June 5, 1936, c.517, 49 Stat. 1477.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: Provided, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder. Added June 5, 1936, c.517, 49 Stat. 1477.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no land so reserved and excepted shall be subject to any disposition whatsoever of said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from the land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed.

No money shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding. It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

11-1212. Exchanges--Confirmation of prior exchanges.--The state land commissioner and the selection board are hereby authorized and empowered to effect such exchanges of state owned land for federally owned land, excepting, however, from and after the effective date of this Act, state owned lands containing merchantable saw timber, and do any and all things necessary or required to be done by the state of Arizona in order to comply with the provisions of said Taylor grazing act, as amended, section 28 of the enabling act, as amended, or any other act of Congress relating to the exchange of lands heretofore enacted and any of the rules or regulations passed or promulgated in pursuance thereof. Such exchanges shall be made in the same manner and under the same rules and regulations as required in the selection of lands under the provisions of the enabling act, as amended.

All exchanges for federal land heretofore made by the commissioner and selection board, under the provisions of the Taylor grazing act, as amended, section 28 of the enabling act, as amended, or any other act of Congress applicable thereto, are hereby confirmed and ratified. [Code 1939, § 11-1212 as added by Laws 1948 (7th S.S.), ch. 5, § 2].

LIST NO. T-496 STATE LAND DEPARTMENT Serial No. [illegible]

Office of the State Land Commissioner

PHOENIX, ARIZONA

DEED OF RECONVEYANCE

KNOW ALL MEN BY THESE PRESENTS:

That WHEREAS, the State of Arizona is the owner and/or Reservee of the Land Hereinafter Described: For and in consideration of the exchange of certain lands as authorized under Section 8 of the Act of June 28, 1934, (48 Stat. 1269), as amended: (Base lands used in exchange in Selection List, Number and Serial noted above), the STATE OF ARIZONA does in conformity with the laws of the State of Arizona, Section 12 Public Land Code, approved June 25, 1915, as amended by Section 2954 R.C. 1928, herewith remise, release, quitclaim, grant, convey and relinquish to the United States of America, reserving to THE STATE OF ARIZONA all Mineral Deposits and Rights, together with the right to prospect for, mine and remove the same: from lands described as follows:

GILA AND SALT RIVER BASE MERIDIAN--ARIZONA

TOWNSHIP 4 SOUTH, RANGE 23 EAST
Section 2 - N½N½

TOWNSHIP 4 SOUTH, RANGE 25 EAST
Section 17 - W½
Section 20 - W½
Section 32 - All

TOWNSHIP 5 SOUTH, RANGE 25 EAST
Section 16 - All
Section 32 - All
Section 36 - All

TOWNSHIP 5 SOUTH, RANGE 26 EAST
Section 32 - All

T OWNSHIP 5 SOUTH, RANGE 27 EAST
Section 27 - All

TOWNSHIP 6 SOUTH, RANGE 21 EAST
Section 2 - All

TOWNSHIP 6 SOUTH, RANGE 25 EAST
Section 2 - All

TOWNSHIP 8 SOUTH, RANGE 20 EAST
Section 11 - All
Section 32 - All

EXCEPTING MINERAL RIGHTS AND DEPOSITS IN Section 11, Township 8 South, Range 20 East, which was acquired by the State with all minerals therein reserved to the United States in Grazing Act exchange Phoenix 078040, Patented in 1941, Patent No. 1111860

TO HAVE AND TO HOLD the hereinbefore described lands, together with all and singular, the rights and appurtenances thereto in anywise belonging to the said UNITED STATES OF AMERICA, its successors and assigns forever.

IN WITNESS WHEREOF the State of Arizona has caused this DEED OF RECONVEYANCE to be executed by its duly authorized officers and its Great Seal hereunto affixed this 11th day of May, 1945.

ATTEST: Dan E. Garvey,
Secretary of State

(SEAL)

/ag/ Sidney P. Osborn
Governor of the State of Arizona

O. C. Williams
State Land Commissioner of Arizona

John L. Sullivan
Attorney General of the State of Arizona.

Filed and recorded at the request of the State Land Department, May 22, 1945 at 4:00 P. M.

By: Lois Owens Deputy

EUNICE COLLINS, County Recorder

STATE OF ARIZONA, COUNTY OF [illegible], ss

I, [illegible], in and for the County and State aforesaid, do hereby certify that the within Evans, Kitchel & Jenckes xxx dated the 22nd day of May, 1945 and recorded in xxx Vol. 47 of Deeds, Records of [illegible], pages 211-212.

WITNESS my hand and official seal this 8th day of April, 1971.

By [illegible]

BEST COPY AVAILABLE

STATE OF ARIZONA
COUNTY OF GRAHAM

I, H. LYLE GRANT County Recorder in and for the County and State aforesaid, do hereby certify that the within instrument is a true and correct copy of that certain DEED

STATE OF ARIZONA to UNITED STATES OF AMERICA

filed for record at 4:00 P. M., on the 22nd day of MAY

A. D., 1945 and recorded in Book No. 43 of DEED

Records, of Graham County, Arizona, at pages 211-212

WITNESS my hand and official seal this 8th day of

APRIL, 1971.

H. LYLE GRANT
Graham County Recorder.

By Ethel Selley
Deputy

C-2

AR 033267

The United States of America

To all to whom these presents shall come, Greeting:

WHEREAS

Phelps Dodge Corporation

is entitled to a Land Patent pursuant to Section 8, Act of June 28, 1934 (48 Stat. 1272), as amended by Section 3, Act of June 26, 1936 (49 Stat. 1976; 43 U.S.C. 315g), in exchange for certain other lands situated in the State of Arizona, for the following described lands:

Gila and Salt River Meridian, Arizona.

T. 5 S., R. 25 E.,
Sec. 35, All;
Sec. 36, All;

T. 6 S., R. 25 E.,
Sec. 2, Lots 1, 2, S½NE¼, SE¼;

T. 5 S., R. 26 E.,
Sec. 31, Lots 1, 2, 3, 4, S½NE¼, S½N½NE¼, E½W½, SE¼;
Sec. 32, All;

T. 6 S., R. 26 E.,
Sec. 4, SW¼NW¼;
Sec. 5, Lots 2, 3, 4, S½N½, W½SW¼;
Sec. 6, Lots 1, 2, 3, 4, 5, S½NE¼, SE¼NW¼, E½SW¼, SE¼;
Sec. 7, E½, E½E½W½, W½SE¼SW¼;
Sec. 8, W½W½NW¼, W½NW¼SW¼, SW¼SW¼, W½SE¼SW¼;

Containing 4,297.12 acres;

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the above named claimant the lands above described; TO HAVE AND TO HOLD the said lands with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant, its successors and assigns forever;

EXCEPTING AND RESERVING TO THE UNITED STATES:

A right-of-way for ditches and canals constructed by the authority of the United States. Act of August 30, 1890, 26 Stat. 391; 43 U.S.C. 945;

Patent Number 02-69-0058

(March 1965)
(formerly 4-1044)

AR 035107

SUBJECT TO and Reserving to the State of Arizona all minerals as appear of record in deed dated May 11, 1945, recorded in Book 47 of Deeds, pages 211-212 of the records of Graham County, as to said sec. 36, Township 5 South, Range 25 East; lots 1 and 2, S½NE¼, SE¼, said sec. 2, Township 6 South, Range 25 East, and said sec. 32, Township 5 South, Range 26 East.

STATE OF ARIZONA, County of Graham, ss. Fee $2.00 No. 683
I hereby certify that the within instrument was filed and recorded
at request of Evans, Kitchel & Jenckes 2-28-69 2:00 P.M.
in Docket No. 138 Page 244-245 and indexed in Patents
Witness my hand and official seal the day and year aforesaid.
H. LYLE GRANT
COUNTY RECORDER By H. Lyle Grant

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

GIVEN under my hand, in Phoenix, Arizona, the THIRD day of FEBRUARY in the year of our Lord one thousand nine hundred and SIXTY-NINE and of the Independence of the United States the one hundred and NINETY-THIRD.

By Glendon E. Collins
Manager, Arizona Land Office.

Patent Number 02-69-0053

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STATE OF ARIZONA
COUNTY OF GRAHAM

I, H. Lyle Grant County Recorder in and for the County and State aforesaid, do hereby certify that the within instrument is a true and correct copy of that certain United States Land Patent, Number 02-69-0058

filed for record at 2:00 P.M., on the 28th day of February A. D., 1969 and recorded in Book No. D-138 of Patent Records, of Graham County, Arizona, at page s 244-245.

WITNESS my hand and official seal this 28th day of February, 19 69

H. Lyle Grant
Graham County Recorder

By H. Lyle Grant
Deputy

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